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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING PART ONE OF THE FOURTH INSTALMENT OF INDIVIDUAL CLAIMS FOR DAMAGES ABOVE US$100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. This is the sixth report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the "Rules"), by the "D1" Panel of Commissioners (the "Panel"), being one of two Panels appointed to review individual claims for damages above US$100,000 (category "D" claims). 1/ This report contains the determinations and recommendations of the Panel in respect of part one of the fourth instalment, comprising 850 of the 1050 category "D" claims in the fourth instalment, submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules on 26 January 1999.

2. The 850 claims contain loss types for which methodologies have already been developed ("application claims"). 2/ Part two of the fourth instalment comprises 200 claims for real property losses. As part of its review of those 200 claims, the Panel will develop the methodology for resolving the majority of real property claims in category "D". In order to allow sufficient time for the development of the methodology, and in view of the complex legal and valuation issues involved in resolving them, the Panel designated the 200 claims "unusually large or complex" pursuant to article 38(d) of the Rules and will review them within a period of twelve months.

3. The Panel began its review of the fourth instalment on 26 January 1999. In addition to regular communications, the Panel met at the Commission's headquarters in Geneva to consider the claims on the following dates: 25-26 January 1999, 22-24 March 1999, 26-27 April 1999, 24-26 May 1999 and 18-21 July 1999. Members of the Panel also visited Kuwait from 18-21 March 1999. During the visit, they met with a number of Kuwaiti Government officials and obtained information relevant for the resolution of claims in parts one and two of the fourth instalment, and for category "D" claims in general.

I. BACKGROUND

A. Background information

4. The factual background relating to Iraq's invasion and occupation of Kuwait that was taken into account by the Panel in reviewing claims in part one of the fourth instalment is set out in detail in the First and Second Reports. 3/

5. The Panel has taken into consideration additional relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules and additional information and views presented by Governments that have submitted claims, and by the Government of Iraq, in response to the reports submitted to the Governing Council by the Executive Secretary in accordance

with article 16 of the Rules. In addition, the Panel has been assisted by expert consultants in the valuation of claims for D4(personal property) losses.

B. General legal framework

6. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's First Report.

C. Applicable evidentiary standard

7. The issue of evidentiary standards to be applied in reviewing category "D" claims was addressed by the Panel in chapter VI of the First Report and chapter II of the Second Report. 4/ The Panel's recommendations in these two reports were approved by the Governing Council in decisions 47 and 49 respectively. 5/ As with previous instalments, the Panel has reviewed the claims in the present instalment and made its recommendations by assessing the documentary and other appropriate evidence as well as balancing the interests of claimants, who had to flee a war zone, with the interests of the Government of Iraq, which is liable only for damage caused as a direct result of its invasion and occupation of Kuwait.

II. NEW ISSUES ARISING IN APPLICATION CLAIMS

8. Some of the application claims in this instalment raise new issues that were not dealt with in any of the Panel's previous reports. These new issues and the Panel's determinations thereon are set out below.

A. Jurisdictional issues: Claims for losses that occurred outside the jurisdictional period

9. The Panel reviewed a number of claims for losses that occurred outside the jurisdictional period. One claim was for loss of personal property that a claimant asserts was lost as a result of his detention by Iraqi security forces from January to July 1990. Another claimant claimed for property that was stolen in June 1991. The Panel also considered a claim for household goods which appeared, from the evidence, to have been in the possession of the claimant as late as 1993. In all of the above circumstances, the Panel determines that the claimants have failed to prove that their personal property losses occurred as a direct result of Iraq's invasion and occupation of Kuwait and decides that the claims are not compensable.

B. D1(money) issues: Claim for expenses incurred as a result of an inability to leave Kuwait

10. The Panel has considered a claim for D1(money) losses for transportation and hotel expenses in Iraq. The claimant is a tetraplegic.

During the jurisdictional period, the Iraqi authorities seized the claimant's specially adapted hand-controlled motor vehicle from him in Kuwait. The claimant travelled to Iraq from his home in Kuwait to appeal to the authorities to return the vehicle, as he intended to use it to travel to a neighbouring country. Despite repeated requests, the authorities refused to release the vehicle to the claimant. The Panel finds that the claimant has shown a direct causal link between the expenses incurred in attempting to secure the release of his vehicle and the invasion and occupation of Kuwait, and that the claim is compensable. The claimant also submitted a claim for mental pain and anguish as a result of being forced to hide. The Panel determines that the circumstances show that he was not forced to hide, but that he was illegally detained by Iraqi authorities. The Panel has therefore treated the claim as one for illegal detention and recommends compensation accordingly.

C. D4(personal property)("D4(PP)") issues: Ownership, loss and causal relationship test ("OLC Test")

11. In some claims, claimants failed to submit any documentation in support of personal property losses, and have not responded to requests for additional information pursuant to article 34 of the Rules. Some claimants failed to prove their presence or residence in Iraq or Kuwait before or at the time of the invasion. In one case, the claimant was resident in Bahrain at the time of the invasion, while another claimant was studying in the United States of America and has failed to prove that he had a home in Kuwait. The Panel determines that no compensation should be awarded for any of those claims.

D. Claims for items not covered by the D4(PP) compensation methodology

12. As part of its review of the D4(PP) claims in part one of the fourth instalment, the Panel has reviewed claims for the following items not covered by the compensation methodology developed in part two of the second instalment. 6/

1. Boats

13. The Panel has reviewed claims for loss or damage to boats and determines that where a claim is for the total loss of a boat, compensation will be calculated based on the 1990 value. Depreciation will be calculated on the basis of the age of the boat at the time of loss and the nature of its use. The Panel decides that it will not recommend compensation for repair costs which exceed the value of the boat as at 1 August 1990.

2. Valuation of poultry, agricultural produce and trees

14. In part two of the second instalment, the Panel developed valuation tables for livestock, bloodstock and gold. Part one of the fourth instalment includes claims for poultry, agricultural produce and trees

which were not covered by the developed methodology. With the assistance of its expert consultants, the Panel has developed tables to be applied in the valuation of these items.

3. Claims for intellectual property

15. The Panel has reviewed a number of claims for intellectual property losses in part one of the fourth instalment. 7/ The Panel determines that there is a presumption of ownership in favour of the author of the work. The Panel further determines that in order to resolve any ownership issues that might arise in cases where claimants indicate that they were working under the auspices of a grant, it would be necessary to examine the terms of the grant to ascertain ownership.

E. D4(motor vehicle)("D4(MV)") issue: Valuation of motor vehicles for which no values are indicated on the motor vehicle valuation (MVV) table

16. The Panel found that there were a number of claims for motor vehicles which could not be valued using the Motor Vehicle Valuation Table. 8/ The secretariat assisted the Panel in arriving at 1990 market values for these claims by depreciating the claimed values. The applicable depreciation rates have been established in each case by taking into account the cost price and the year of purchase and/or the year of manufacture of the motor vehicle.

III. PANEL DETERMINATIONS ON OTHER CLAIMS IN PART ONE OF THE FOURTH INSTALMENT

17. The Panel has been conscious of the fact that in part one of the fourth instalment it has undertaken the consideration of the largest number of claims referred to it so far, and that all these claims have been designated application claims. At each of its meetings in Geneva, the Panel has therefore extensively reviewed individual claims, examined the application of the methodologies developed by the Panel and satisfied itself that the appropriate methodologies have been applied to the claims in the instalment. In the course of such examination, wherever claims gave rise to new issues not considered in previous instalments, the Panel ensured that these were resolved so as to be consistent with the methodologies established by the Panel.

18. The Panel defers its recommendations on a small number of claims because they contain loss types that cannot be resolved in part one of the fourth instalment. 9/

19. A number of claimants filed claims in category "D" specifically for interest on the value of their category "C" or "D" claims. In the First Report, the Panel determined that interest would be paid in accordance with Governing Council decision 16. 10/ The Panel notes that this is consistent with the recommendation of the Category "C" Panel of Commissioners in its

first report. 11/ Interest will be paid on all successful claims in both categories "C" and "D" as a matter of course at a later date.

20. The Panel has also considered a number of claims for preparation costs, including legal and loss adjusting fees. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary that the Governing Council intends to resolve the issue of claims preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claims for such costs.

IV. CROSS CATEGORY ISSUES

Deductions of category "A", "B" and "C" awards

21. Pursuant to Governing Council decision 8, 12/ which caps awards for claims for mental pain and anguish, and recommendations by the Panel concerning awards approved in respect of related claims in categories "A", "B" and/or "C", 13/ the Panel recalls that in its First, Third, and Fifth reports, 14/ it reported all category "D" awards without deductions of awards in related claims in categories "A", "B" and "C" having been made, as not all category "C" claims had been resolved. Following the approval by the Governing Council of the last report of the Category "C" Panel of Commissioners, 15/ deductions of approved awards in respect of related claims in categories "A", "B" and/or "C" can now be effected. Recommended awards in respect of claims in part one of the fourth instalment and in future instalments will be reported net of deductions of "A", "B" and "C" approved awards.

V. RECOMMENDATIONS

A. Awards by submitting entity

22. The annex hereto lists the awards recommended by the Panel for each Government and international organization that has claimants included in part one of the fourth instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the annex, against the total amount claimed of US$198,200,791.63, the Panel has recommended compensation totalling US$76,434,676.74.

B. Interest and exchange rates

23. The Panel recommends that interest be awarded pursuant to its determinations as set out in paragraphs 64-65 of the First Report.

24. For purposes of calculating recommended amounts, the Panel has converted currencies other than United States dollars into United States dollars in accordance with the rates set out in paragraphs 61-63 of the First Report.

25. In paragraph 39 of its Fifth Report, the Panel noted that where losses are claimed for money in currencies other than United States dollars and it is established from the evidence in the claim file that the application of the exchange rate approved by the Panel mentioned above would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the loss suffered. In particular, this would be applied in situations where the claimant has submitted evidence that he or she purchased the money at a rate different than the rate approved by the Panel.

C. Submission through the Executive Secretary to the Governing Council

26. The Panel respectfully submits this report through the Executive Secretary to the Governing Council, pursuant to article 38(e) of the Rules.

Geneva, 20 July 1999

(Signed) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) M. C. Pryles
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ In the first instalment of category "D" claims, the Panel developed methodologies for the following loss types: D1(money); D1(mental pain and anguish ("MPA"); D3(death); D4(motor vehicles); D6(loss of income); D10(payment or relief to others); and D10(other). A full description of the methodologies is set out at paragraphs 103 to 382 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/1) ("First Report"). The Panel developed methodologies for the following loss types in part one of the second instalment: D2(personal injury) and D5(loss of bank accounts, stocks and other securities). These methodologies are described in the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/11) ("Third Report"), at paragraphs 41-116. Further, the Panel developed the methodology for D4 (personal property) losses in part two of the second instalment. This methodology is described in the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Second Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/15) ("Fourth Report"), at paragraphs 30-57.

3/ See in particular chapter II of the First Report and chapter IV of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1998/3) ("Second Report").

4/ See also paragraph 8 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) which provides that "[s]ince ... [D] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss". See also articles 35(2) and (3) of the Rules.

5/ S/AC.26/Dec.47 (1998) and S/AC.26/Dec.49 (1998).

6/ See paragraphs 35-51 of the Fourth Report.

7/ Following its previous decision, as set out in paragraph 24 of the Fourth Report, the Panel considered that these claims were properly within the D4(PP) loss type.

8/ See paragraphs 251, 267-272 of the First Report for a description of the MVV Table and the D4(MV) valuation methodology.

9/ The claims contain D7 (real property) and D8/9(business loss) losses for which methodologies are yet to be developed.

10/ Paragraph 1 of decision 16 (S/AC.26/1992/16) states that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". See also paragraphs 64-65 of the First Report.

11/ See page 33 of the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims For Damages Up To US$100,000 (Category "C" Claims)" S/AC.26/1994/3.

12/ S/AC.26/1992/8.

13/ See paragraphs 84, 113, 222, 237, 211, 335 and 336 of the First Report; and paragraphs 54 and 55 of the Fourth Report.

14/ The Panel's "Report and Recommendations Made by the Panel of Commissioners Concerning The Third Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)" (S/AC.26/1999/9) ("Fifth Report") was approved by Governing Council decision S/AC.26/Dec.68 (1999).

15/ S/AC.29/1999/11 approved by Governing Council decision S/AC.26/Dec.70 (1999).

Annex

SUMMARY RECOMMENDATIONS OF PART ONE OF THE FOURTH INSTALMENT OF CATEGORY "D" CLAIMS

Submitting Entity	Amount claimed (US$)	Number of claims recommended	Number of claims not recommended for payment or (deferred) a/	Amount of compensation (US$)
Algeria	200,100.35	1	0	55,469.07
Australia	3,103,864.44	8	1	526,247.51
Austria	113,707.95	1	0	23,027.82
Belgium	566,826.00	1	1	700.00
Bulgaria	187,370.25	1	0	66,564.02
Canada	5,931,732.19	29	0	1,697,291.90
Denmark	426,544.25	3	0	73,219.55
Egypt	4,392,052.15	3	1	112,661.39
France	6,044,488.92	17	3 (1)	769,356.83
Germany	4,457,572.13	17	1	1,505,235.48
Greece	924,695.81	3	0	176,975.56
Ireland	204,509.85	2	0	83,656.58
India	47,507,873.26	190	6 (4)	9,104,304.40
Israel	3,901,543.76	2	0	201,163.50
Italy	2,327,524.45	9	1 (1)	530,580.59
Japan	1,000,325.00	3	0	379,936.20
Jordan	15,035,531.70	48	13 (7)	1,857,575.62
Kuwait	57,342,437.05	229	2 b/ (5)	42,068,963.28
Lebanon	4,744,460.39	17	0 (3)	2,168,800.48
Pakistan	2,418,992.14	15	1 (13)	875,447.63
Philippines	911,339.72	6	0	438,956.23
Poland	220,052.19	2	0	89,313.17
Singapore	123,512.28	1	0	56,668.79
Spain	111,470.00	1	0	6,228.00
Sudan	1,491,495.30	5	1 (1)	422,484.85
Sweden	1,552,328.47	8	0	895,837.98

Submitting Entity	Amount claimed (US$)	Number of claims recommended	Number of claims not recommended for payment or (deferred) a/	Amount of compensation (US$)
Syria	1,308,846.01	7	0 (3)	587,627.92
Turkey	812,186.00	3	0	310,077.71
United Kingdom	16,738,876.53	78	5 (3)	6,455,839.41
United States of America	11,707,465.62	48	2 (3)	4,153,619.24
Yemen	394,885.81	1	0	110,048.24
UNDP Algeria	171,451.05	1	0	72,818.29
UNDP Kuwait	411,113.49	1	0	48,267.45
UNDP UAE	142,083.00	1	0	35,515.00
UNDP Washington	413,089.32	3	1	127,607.52
UNRWA Gaza	858,444.80	2	0	335,334.39
Total	198,200,791.63	767	39 (44)	76,423,421.60

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a/ Numbers in parentheses represent claims that have been deferred for reasons set out in paragraph 18 of the report.

b/ Includes one withdrawn claim.